



## **Unite the union response to the Scottish Civil Courts Review**

**This response is submitted by Unite the Union. Unite is the UK's largest trade union with 2 million members across the private and public sectors. The union's members work in a range of industries including manufacturing, financial services, print, media, construction, transport and local government, education, health and not for profit sectors.**

**Unite and its members are substantial users of the civil court system throughout the UK, including Scotland. We have significant experience from the consideration of a claim to having responsibility for the payment of costs. Unite has over 200,000 members in Scotland. The union legal service also covers family members in relation to personal injury cases.**

**Those who are able to benefit from the union's legal service receive their damages intact. The service is not "no win – no fee", it is "no fee win or lose".**

### **Executive Summary**

- Unite appreciates the opportunity to respond and take part in the review and we wish to contribute in a positive way to promote access to justice for all based on our considerable experience.
- Unite believes in the principle that the person who suffers injury or damage due to the fault of another should receive restitution or compensation without cost to them. Anything else is not justice.
- We welcome an initiative for Public Legal Education and believe the role of trade unions as a force for good in society is integral to such an initiative.
- Unions understand mediation and indeed seek to avoid claims by encouraging prevention of injury and promoting health and safety

- No other group of organisations have experience from being approached for assistance, through monitoring service delivery, dealing with complaints in individual cases and having responsibility for costs as unions' do.
- Unite does is not averse to change, but is very keen to avoid change that has an adverse effect on access to justice.
- One change we would wish to see would be to treat personal injury matters as a special case in relation to the privative jurisdiction.
- Unite can also see the benefits for access to justice for all from conditional fees, alongside recoverable success fees and recoverable adverse costs insurance, including self insurance for membership organisations.
- The lessons to be learned from other jurisdictions can be looked at to prevent repetition in Scotland.
- The Court of Session and use of jury trials are just two of the features of the civil justice system that have considerable benefits for access to justice.

### **Consultation Paper – Introductory remarks from Unite**

The consultation paper refers to a comment made on 20 April 2006 in the Scottish Parliament that there is a "clear consensus that disproportionate costs and unacceptable delays should be addressed". Perhaps these reflect laudable aims, but this should not be at the cost of access to justice, particularly to those with legitimate and justifiable modest claims. Further we understand there is no evidence that this applies in relation to personal injury claims.

On page 3 there is reference to the "disproportionate cost of litigation, particularly in relation to cases of low monetary value" as being "in urgent need of attention".

All too often the cost is created by unnecessary resistance by defenders and insurers. For working people and those who have retired even sums considered modest by some are substantial to them. Even £2,500 represents about three months pay to someone on the minimum wage and can spell the difference between persistent debt and making ends meet.

It is not good for access to justice to allow or encourage insurers or defenders to out spend the pursuer with a legitimate claim.

Page 3 also refers to the fact that "A good civil justice system must provide citizens with high quality advice, information and assistance, at a price they can afford..." However, members of Unite and their families are given legal support in large numbers of injury cases at no cost to them – win or lose. The defenders are invariably insured. Other unions provide a similar service and many more can take cases who have proper funding arrangements and there is an insured defender. These are by far and away the majority of personal injury cases. The few should not undermine access to justice for the many.

Nevertheless, Unite and other unions discourage unwarranted claims and seek to keep costs to a minimum, not least by instructing efficient and proficient lawyers. The union and its solicitors are in fact a service to the courts and justice in general by advising on cases that cannot be taken forward.

Indeed unions discourage claims by encouraging prevention of injury, health and safety and discouraging bad employment practices. Otherwise claims can encourage health and safety compliance.

It is in the nature of unions and Unite favours dispute resolution. However, Unite is adamant that adequate remedy should remain available from the recalcitrant wrong doer at no cost to the successful claimant as a key tenet of access to justice for our members and the public at large.

Questions have been asked about the value of actions for compensation in the context of the need to raise health and safety standards. Unite cites the requirement for protection from moving parts of machinery in the Factories Act of 1961 and the strict liability for injury. Many felt that it was impossible to take practical steps to adapt machinery to prevent injury, but over the course of time ingenious means have been designed, no doubt in the shadow of claims for damages. More recently from the 70's to the 90's nurses lifting cases have resulted in much improved practices after health authorities spent years defending practices that were thought to be an occupational hazard. Unite is not aware of any criminal prosecutions in relation to nurses lifting, but there were many injury claims, which ultimately had the effect of fewer nurses and patients being injured. This was to the benefit of the health service and society as a whole. There is, for example, no point in training a nurse, who cannot work again as a result of such an injury. Even more recently we have the impact of "stress" cases, which have resulted in the issue being taken much more seriously.

Unite does not chose to bring such cases, it would prefer that these preventable events never happened.

## **Responses to questions posed by the consultation paper**

### **Chapter One: Introduction**

#### **1. Should the civil justice system be designed to encourage early resolution of disputes, preferably without resort to the courts? If so, what would be the key features of such a system?**

Yes. However this must not be at the expense of access to justice, even in modest claims.

Unite believes that the key feature of such a system should be early admissions from insurers in appropriate cases (with the arrangements between pursuers and their representatives and funding arrangements in place from the outset). The defenders and insurers should have reasonable encouragement to make early admissions and put forward acceptable offers at an early stage, but also suffer penalties if they do not. The penalties should be effective. Clearly the penalty of having to pay increased costs for work done as a result of their failure is of benefit in terms of access to justice, but may not be enough. Being prevented from defending, paying increased damages or penalty costs would be appropriate sanctions.

There do not need to be sanctions on pursuers beyond having to pay costs or their representatives having no costs if they fail.

#### **2. Do you agree that the principles and assumptions discussed in paragraphs 1.11 to 1.14 are a sound basis for the development of the Review's recommendations? Should they be supplemented by other factors?**

Unite accepts the Scottish Executive's definition of proportionality (page 3-4) "in terms of resolving disputes within a reasonable time and at reasonable cost both the parties involved and to the public purse". Unite is concerned how that might be interpreted in practice in light of the comments that follow and which appear and have appeared elsewhere. Unite is particularly concerned lest the references to proportionality harm access to justice by facilitating a practice of defenders and insurers outpending pursuers by encouraging legal expenses to the extent that pursuers are discouraged from pursuing legitimate claims of modest value.

Unite agrees that the aim of any review should be "to improve the system for the benefit of those whom it is intended to serve, rather than those who work within it". With all due respect to the judiciary and their integrity and skill at their work, they do not have the benefit of experienced court users and do not have the same perspective. Indeed,

we appreciate Unite does not either have the same perspective as the law firms that it instructs and we seek to take such matters fully into account in making this response.

On the same tack, Unite understands that others representing the “consumer” have a different perspective in relation to their experience and for those they seek to represent. In particular cases – not just union cases – involving a properly funded pursuer and an insured defender are very different to those involving a member of the public seeking redress in relation to faulty goods or unacceptable services.

Unite believes that no other body represents more individuals who pursue injury claims than Unite itself. No other group of organisations have experience from the outset and being approached for assistance, through monitoring service delivery, dealing with complaints in individual cases and having responsibility for costs as unions’ do. Unite’s lawyers can proceed in more meritorious complex and disease cases, when others may be unwilling to do so, particularly on a speculative basis.

**3. Are there any matters within the Review’s remit about which you have concerns but which are not dealt with in this paper?**

Yes.

Unite has concerns that the change in privative jurisdiction with effect from 14 January will have an adverse effect on access to justice particularly in relation to personal injury cases, which are or can be invariably properly funded for pursuers and taken against insured defenders. This has cost implications that only benefit defenders and insurers. The short comings of Sheriff Court system to cope across Scotland do not appear to have been properly considered in this context. We hope that comments in this response will make the case for personal injury cases being treated as a special case. We refer, for example to Appendix 1 relating to features of employers’ liability cases and Appendix 3 relating to the experiences in England & Wales in relation to the “Woolf reforms”.

Unite is also concerned to address failings, such as those identified in the consultation paper in relation to legal aid (paragraph 3.25 on page 22), by providing pursuers with the opportunity for a conditional expense arrangement, success fees and insurance for adverse costs (to include “self insurance” for membership organisations). This will improve access to justice for all in appropriate cases, not just Unite and its members.

Unite also notes the lack of detail about “claims farmers” and the question of “third party capture” dealt with below.

## **Chapter Two: Access to Justice**

### **1. What contribution can public legal education make to improving access to justice?**

Unite the union supports the principle of public legal education. We agree that it can have a significant effect on improving access to justice.

Unite believes this should extend to education as to rights and responsibilities at school and throughout life. Public Legal Education should also extend beyond the civil courts jurisdiction.

Unite believes that unions should have a place at the centre of public legal education. This should include an emphasis on the value of union membership for:

- the prevention of harm or other detriment at work,
- the encouragement of dispute resolution and
- the availability of effective support for those who need to pursue meritorious actions.

Unite believes in improving access to justice and avoiding unnecessary litigation.

### **2. Are there any particular geographical or subject areas in which there are gaps in provision in relation to civil legal advice or representation? If so, where?**

The service Unite provides relies on specialist lawyers, who are inevitably centred on Glasgow and Edinburgh (although one of Unite's specialist law firms has opened an office in Aberdeen). Unite does not rely on more than a small number of firms. This facilitates its ability to monitor service levels and maintain quality standards, as well as building up trust and arrangements generally to its mutual benefit and that of its members and their families.

Any change that results in more cases being taken away from the offices where the union's solicitors work adds to cost and results in greater reliance on agents, whose services the union is less able to monitor.

Under the current system, greater need to use the Sheriff Courts would also result in more expense as the union believes it is appropriate to instruct advocates in many personal injury cases, particularly in employers' liability cases. Please see Appendix 1.

In most cases before the Sheriff Courts advocates' fees are not provided for. The expense of a advocate (in place of a solicitor) is eminently justifiable as a cost to the insurer in those cases that have merit and

succeed and we are prepared for the cost if the case is unsuccessful. To prevent the recovery of the expense of an advocate fails to recognise the saving to the defender of the alternative expense of a solicitor.

Legal expenses that our lawyers cannot recover amount to a cost we must seek to cater for. Unite considers that anything less than full recovery of legal expenses does not constitute redress, is less than access to justice and serves only to benefit wrong doers, or their insurers.

### **3. To what extent is it (a) desirable or (b) feasible to design court procedures with a view to enabling litigants to take part in the process without legal representation?**

It is the experience of Unite the union that unrepresented injured people suffer at the hands of insurers. Insurers deny liability when they should not and offer too little by way of damages, when they are prepared to accept that they should pay. We attach (as Appendix 2) a sample of cases that Unite sent to the Financial Services Authority of current practices by insurers as evidence of the problem of "third party capture".

Those who can benefit from Unite membership and our services do not need to struggle without representation. The opportunity for representation, including through union membership should be encouraged. Litigants in person consume a disproportionate amount of the courts resources. Those that feel the need or are obliged to represent themselves often have the patient support of the courts under the current system. Unite does not believe that litigants in person should be encouraged further, however. Its experience demonstrates clearly to the union the need for effective representation to secure justice.

Unite believes that the problem with the unavailability of legal aid, or legal aid at a cost is best dealt with by conditional fees, success fees and insurance for adverse costs (to include "self insurance" for membership organisations). Unite understands that the promotion of such matters in Scotland is hampered by the satellite litigation that has occurred in England and Wales. However, the declaration by insurers of a "costs war" is a very poor reason to give in to them at the expense of access to justice for injured people.

### **4. What contribution, if any, can (a) "self-help" services for party litigants and (b) court based advice services make to improving access to justice?**

Unite considers that the answer we have given to 3. above covers this. Any advice should include reference to the benefits of union membership, including to those who are family members of a union member.

## **5. Are there any other issues which impact on access to justice in Scotland which the Review should consider?**

Please see comments above in answer to question 3 from Chapter 1, referring to privative jurisdiction, conditional expenses (with success fees and recoverable adverse costs insurance, including self insurance premiums for membership organisations), claims companies and “third party capture”.

## **6. Is there a case for a new method of dealing with low value cases? If so, should this be within the existing court structure or separate from it? What kind of cases would be suitable for such treatment?**

Unite believes that a new method of dealing with lower value cases may seriously adversely affect access to justice particularly in personal injury cases in ways that are not apparently clearly understood.

For working people and those who have retired even sums considered modest by some are substantial to them. Even £2,500 represents about three months pay to one on the minimum wage and can spell the difference between persistent debt and making ends meet.

In relation to the PIAB, the reference in the consultation paper (at paragraph 2.19) amounts to the PIAB saying of itself that is a success. It is not. Much of the cost “saving” is actually matched by payments by the injured seeking advice. There are many cases proceeding through the courts system now, after being stalled by the PIAB and in relation to awards considered to be too low. The “frictional” costs of the old system were caused in large part by the insurance backed defenders. It is they who benefit from the new system. The cost of insurance policies have not fallen. Meanwhile, the potential claimants have to put up with an initial outlay and no representative to support them. For decades those who had the benefit of Unite in Ireland behind them were deprived.

Generally, Unite (and other unions) cannot afford to fund cases if those with merit do not have costs recovery. Unite is prepared to have in place arrangements that cover the cost of losing, as the union has for decades.

## **Chapter 3: The cost and funding of litigation**

### **1. What, if any, information can you give the Review about levels of legal expenses in litigation, and how such expenses compare with sums awarded by the court or settlement figures?**

In principle Unite believes that legal expenses should provide fair remuneration for representatives. They should be paid for work reasonably and necessarily undertaken, particularly in relation to meritorious claims. This should properly be assessed by the court in relation to each case, unless agreed.

The wrong doer, who is invariably insured in personal injury cases should pay legal expenses in full.

Fixed or predictive costs of necessity will either pay too much or too little. The impact of behaviour in other jurisdictions has not been assessed. For example, the fixed or predictive costs regime in relation to in pre issue road traffic cases in England & Wales has never been reviewed to consider the impact on behaviour. In some instances now practitioners are reporting that insurers who benefit from a rigid costs regime post issue are forcing claimant lawyers to issue, when the costs are lower. The belief by some of the judiciary that representatives will take the swings and roundabouts approach lacks empirical evidence. Unite has concerns about behaviour over the long term and the prospect of "cherry picking". Fixed costs post issue have the opposite effect in terms of the incentive for insurers to settle. Insurers can simply outspend the pursuer.

Damages for injury have historically not kept pace with inflation. In England and Wales this has been recognised in Law Commission Paper 257 published on 15 December 1998 (available here: <http://www.open.gov.uk/lawcomm/> ).

However, the Scottish system can be proud that it has the facility to address this to an extent by the use of the jury trial, which works well in Scotland and is not subject to the excesses experienced elsewhere (for example in the United States).

Unions have supplemented the state legal aid system for decades. The cost of legal aid to the state has been reduced in relation to every union backed case. Unite, like other unions, is a not-for-profit organisation. Unite's primary motivation is to ensure it provides a legal service to union members that is second to none in terms of quality and service delivery.

The union's ability to continue to fund and support cases requires a system that does not make its support of cases unsustainable. This cannot benefit access to justice or society as a whole. Other representation tries to equal the exceptional service available to the union's members.

Insurers complain that legal expenses are too high – The Association of British Insurers have repeatedly referred to figures that for every £1 paid in damages 40 pence is paid in costs (this is not 40%, but 28.6% of the

cost of the system. They say that this (inevitably) rises considerably in small cases, but the figure they produce is still less than 50%. We understand these figures may relate to cases in England and Wales only, but the insurers seek to control this debate in Scotland.

Legal expenses are, however, mainly a direct product of their behaviour, as this one case shows. On 23<sup>rd</sup> April 2007 judgment was entered in an English County Court in a classic low impact velocity case for £1,386.12, plus costs. Liability had been admitted in August 2005. The solicitors for the injured party had said they would take £1,200 in June 2006. On 19 April 2007 they put forward a reduced offer and what they considered to be a compromise in relation to the legal expenses amounting to less than half they were entitled to on a proper assessment of the expenses incurred to pursue the case. After damages were assessed on the day of the trial, the costs were assessed at nearly £26,000. That figure did not include the costs of the defence. The insurers had never offered a penny. They chose to argue that no injury was suffered in the accident, but turned up on the morning of trial without the medical evidence to back that up. This may be an unusual example, but it is not unusual and serves to illustrate the point. The insurers then include such cases to argue that costs are too high and that proportionality is an issue.

See also Hall & Ors v Stone [2007] EWCA Civ 1354 (available here: <http://www.hrothgar.co.uk/YAWS/rebs/07a1354.htm> ).

## **2. To what extent does the cost of litigating deter people from pursuing or defending cases in court?**

Clearly the costs of litigation do not appear to deter insurers defending when they should not and offering too little compensation.

Those who have the benefit of union support need not be deterred from pursuing litigation. However, this does not mean that Unite will allow them to pursue a case unless they have a justifiable claim and one that is more likely than not to succeed. Unite believes that most if not all unions have behaved responsibly in relation to their support of cases. Unite has the advantage of reliance upon expert solicitors, with whom we have developed a relationship. Unite can rely on this expertise to take more good cases and fewer bad ones.

Other funding arrangements can be made available for those who do not have the benefit of union legal services

The "Report on the Chapter 43 PI Procedures" for the year to 31 December 2007 helps to show that the number of cases that are union backed is likely to be more than half. Unite estimates that number backed by the union is the greatest proportion of those.

It is particularly important to ensure that access to justice for the many is not diminished by consideration of issues that are perceived by some to be the concerns of the few.

For these purposes Unite believes it not only represents the many, but has great experience of their needs. It also believes that this puts the union in a position to speak for all those individuals who have a need to use the court service to take action (especially for personal injury) against a wrongdoer, when the pursuer has proper funding in place and the wrongdoer is insured.

**3. Does the current system of levying court fees affect access to justice? If so, how and in what kinds of cases?**

Not particularly at this time for Unite. However, it should be born in mind that innocent victims of a tort, for example, or their representatives are bearing a cost up front, which should ultimately be paid by an insurer. This runs against the principle of "polluter pays". The court fees should be payable at the end of the case. The position will be made worse if court fees rise.

**4. Are the current rules for recovery of judicial expenses satisfactory?**

Unite believes that legitimate expenses reasonably incurred and considered appropriate as between agent and client should be paid by the wrongdoer. Anything less is not restitution and is a benefit to the wrongdoer or the insurer.

Increasing costs paid by the losing party to close the gap between party/party and agent/client expenses should serve as an incentive not to defend unnecessarily, to make unreasonably low offers and to assist in terms of health and safety.

Unite would go further and look for effective penalties for bad behaviour. This could include penalty interest having the effect of increasing the award to a pursuer and increased expenses (although the union prefers the former) in relation to a defenders failure to beat an offer to settle on behalf of a pursuer.

**5. Are the current arrangements for the taxation of judicial accounts of expenses satisfactory?**

The suggestion at footnote 40 on page 21 is sensible. This would provide the opportunity for the pursuers' or defenders' representative to make a

formal offer to settle, with penalties if the opposing party fails to beat the offer.

Generally the assessment of expenses is key to ensuring that the expense of litigation is a sum which was reasonably incurred in securing a just result.

**6. To what extent and in what respects does the availability of legal advice and assistance and legal aid affect access to justice?**

It follows from what has been said above in relation to the unchecked behaviour of insurers that Unite believes that the availability of sound legal advice and assistance is key to access to justice.

Legal aid is restricted and could be replaced by conditional fees, recoverable success fees and the recoverable costs of legal expense protection (including for union support).

However, legal aid may be required for the foreseeable future in relation to clinical negligence and injury to children, unless alternative support, including union support (particularly for the child of a union member) is available.

The observations in the consultation paper on in paragraph 3.25 on page 22 indicate that the legal aid system is not working as it should in the interests of access to justice. If conditional fee arrangements are used, when success fees are not recoverable and the cost of an "after the event" policy falls to the pursuer with a legitimate and ultimately successful claim, justice is not being served.

**7. Are there specific areas in which you believe there is a particular problem in obtaining funding for litigation?**

Please see comments above.

**8. What impact have speculative fee arrangements had on access to justice?**

Unite's experience of changes in civil procedure in England & Wales, shows that there are problems. However, in relation to Scotland and elsewhere the union believes that lessons can be learned and speculative fee arrangements can produce significant benefits to access to justice. The position in Scotland is likely to be improved with recoverable success fees and the expense of adverse costs protection (to include the "self insurance premium" for membership organisations).

Unite does not object to competition with its services that results in delivery of a first class legal at no cost to the legitimate injured party and at no cost to the successful defender. This should not give rise to claims with poor prospects being taken.

**9. Should legal expenses insurance, including “before the event” and “after the event” insurance, have a greater role to play in the funding of litigation in Scotland?**

We have referred to after the event (ATE) cover above. ATE policies may be inferior to union cover. For example, there may be a limit of cover, which does not apply in union cases.

“Compinsure” an ATE product promoted by the Law Society of Scotland was unsuccessful and has withdrawn from offering ATE insurance in Scotland.

There are significant problems in relation to “before the event” (BTE) insurance. This is especially so as a routine add on to other policies. It is not “offered” and is miss-sold. It is cheap, because it is underutilised. If take up was increased opportunities in the policies for the insurer to decline support would also increase. Costs would rise. Even now there are problems with legitimate claims being rejected and legal advisers in England & Wales being incentivised to err on the side of discouraging claims.

**10. What impact would the ability to recover “after the event” insurance premiums from unsuccessful parties have on litigation?**

We have expressed views in relation to ATE and recovery of self insurance premiums for membership organisations above.

**Chapter 4: THE STRUCTURE AND JURISDICTION OF THE CIVIL COURTS**

**1. Do you agree that the conduct of the civil business of the courts is adversely affected by the pressure of criminal business?**

Yes.

**2. Should (a) some judges of the Supreme Courts and (b) some sheriffs be designated to deal with civil business?**

Unite would demand no less for its members and their families that judges given responsibility for adjudicating in relation to a civil action, in particular a personal injury action, and especially one in relation to

employers liability should apply the law effectively. Unfortunately, in practice this does not happen as it should. That is not to say there are not Sheriffs and Sheriff Principals who can and do adjudicate effectively.

Practitioners in England & Wales continue to advise that County Court Judges who specialise in civil matters make poor decisions on a regular basis. This leads to uncertainty and encourages speculative defences. Some Judges apply "common sense" and "fairness" as they perceive it rather than, for example, strict liability for breach of statutory duty in an employer's liability case.

The high standard of the judiciary in the Court of Session and the higher courts generally in Scotland is widely recognised. This is not apparently undermined by a lack of specialisation. Instead, the number of personal injury cases before the Court of Session up to 14 January 2008 must have enhanced their experience, ability and reputation.

Court of Session cases in personal injury cases are regularly reported and cited in England & Wales. Indeed for over a century a significant proportion of important cases arose in the Court of Session – Donaghue v Stevenson and Bourhill v Young to name but two. However, the reason for the reliance on Scottish authority is because of the failings of the system in England & Wales following the changes introduced over 10 years ago.

Unite does not rest on an argument that if it is not broken no attempt should be made to fix it, but it relies on its experience to inform its view that changes contemplated in Scotland will make matters worse and undermine access to justice.

### **3. Should the sheriff courts be separated into civil and criminal divisions? What would be the advantages and disadvantages of such a separation?**

Unite's response depends to an extent on consideration of other changes to the legal system. However, for organisational reasons alone, it would be sensible to avoid the need for urgency in some criminal matters resulting in adjournments and delays in civil cases.

### **4. Should there be a greater degree of specialisation within the civil courts in Scotland? If so, in what types of case and in which courts?**

Unite believes that the Chapter 43 PI procedures in the Court of Session work well for our members. Unite wishes to see change to allow all injury cases, including those of modest value to continue to be raised in the

Court of Session. Unite is opposed to changes that experience tells us undermines access to justice to its members and the public at large.

**5. What are the key factors which influence the decision to raise an action in either the Court of Session or the sheriff court where jurisdiction is concurrent?**

Unite would be content for everyone to chose and it is clear what that choice we would favour, under the current system. The option to raise cases in the Court of Session should be permitted in all personal injury cases, or as many employers' liability cases as possible to maximise access to justice.

**6. In what, if any, types of case should (a) the Court of Session (b) the sheriff court have exclusive jurisdiction?**

See answer to 5. Above.

**7. Should the jurisdiction of the Court of Session and the sheriff court be unified to create a single civil court?**

Such a change would likely adversely affect access to justice.

**8. Should the Court of Session become a court of appeal only or should it retain a first instance jurisdiction? If so, for what types of action and why?**

No. It should retain a first instance jurisdiction for personal injury cases.

**9. If the current structure of the courts is retained, at what level should the privative jurisdiction of the sheriff court be set?**

The privative jurisdiction in personal injury cases should be set so that the injured person could chose to bring an action in the Court of Session.

**10. Are the current powers to transfer cases between sheriff courts and between the Court of Session and the sheriff court satisfactory?**

Unite is not in a position to comment at this time.

**11. Given the range in value and complexity of civil business in the sheriff court, should there be a tier of civil court below the level of the sheriff court?**

No. Unite does not believe this could assist its members and others like them.

**12. Alternatively, should there be another level of judiciary within the sheriff court to deal with “third tier business”?**

No. See above.

**13. Does the current division of the sheriff court into distinct geographical jurisdictions present difficulties or does it have advantages?**

Please see answer to question 2 in relation to chapter 2 above.

**14. Are the current arrangements for dealing with undefended actions satisfactory?**

Unite is not in a position to comment at this time.

**15. Are the current arrangements for the disposal of cases raising issues of public or administrative law satisfactory?**

Unite is not in a position to comment at this time.

**16. Are there types of business in the sheriff court which could more efficiently or appropriately be dealt with by administrative rather than judicial process? For example, are the current arrangements for the disposal of commissary business satisfactory?**

Unite is not in a position to comment at this time.

**17. Is there a case for a national sheriff court which would allow cases to be raised at sheriff court level anywhere in Scotland? If so, what appeal arrangements should there be?**

Unite would wish to see the Court of Session being available for all personal injury cases. A National Sheriff Court is not desirable.

**18. Is there a case for all sheriffs to have an all-Scotland jurisdiction?**

Yes. Although Unite would wish to see the Court of Session being available for all personal injury cases.

**19. If the sheriff court becomes the primary court of first instance, should there be a power of transfer from the Court of Session to the sheriff court and a power for the sheriff to seek the leave of**

**the Court of Session to transfer a case there? If so, what factors should be taken into account?**

Unite would not wish to see the sheriff court becoming the primary court of first instance. The principles or factors relating to transfer and practicalities of transfer create additional delay, work, expense and confusion. This would be made worse if the sheriff had to seek leave of the Court of Session to transfer a case there.

If the sheriff court was a primary court of first instance, we would wish to see personal injury cases as a special case so that they could be in the Court of Session. Otherwise, the factors to be taken into account should include that on request of the pursuer in a personal injury or employment related matter the action is transferred without further application.

**20. Are the existing appeal arrangements satisfactory?**

Unite is not in a position to comment at this time.

**21. Should the office of sheriff principal be retained or should an alternative office be created? Should that office be judicial or administrative or both?**

Unite is not in a position to comment at this time.

**Chapter 5: PRINCIPLES FOR REFORM TO CIVIL PROCEDURE AND KEY PROCEDURAL ISSUES**

**1. Should the rules of civil procedure have an overriding objective or statement of philosophy and, if so, what should the main elements of that overriding objective or statement of philosophy be?**

Unite agrees with those who say that an overriding objective or statement of philosophy is unnecessary in Scotland. Access to justice for those wronged requires no additional wording that could only serve to undermine the principle.

**2. Should the court (a) encourage, (b) require or (c) in some other way facilitate the use of mediation or other methods of dispute resolution?**

Unite supports the principles of mediation. One of the essential components to successful mediation is that it must be voluntary and cannot be required. Neither can the court involved in the judgment of a dispute be involved as a mediator. Mediation as an option can and should

be promoted. There is a way to go before the courts and practitioners can understand mediation and appreciate its potential.

**3. If so, how should this be done and at what point or points in the progress of a dispute?**

Mediation should be available and promoted as an option throughout the litigation process. Under the Employment Bill currently being considered in the House of Lords, Clause 6 seeks to deal with the removal of fixed periods for conciliation. The provisions for fixed periods of conciliation were introduced in the Employment Act 2002 and did not work.

**4. Are there particular kinds of disputes in which the use of mediation or other methods of dispute resolution is not appropriate and in which a judicial determination is essential? Please specify.**

Theoretically at least, mediation could be available in any case. No party, particularly those who are vulnerable, should feel compelled to undergo mediation.

**5. What form should mediation or other methods of dispute resolution take and how should this be funded?**

A qualified mediator (or mediators) acceptable to the parties should act in accordance with appropriate practice, including by reference to principles outlined above.

The insurer in an appropriate case should (be willing to) pay. In other cases, the parties may agree to pay half, subject to the outcome of the mediation in the context of ongoing or potential litigation and in relation to a failed mediation, the fee should be paid by the party responsible for the litigation expenses (regardless of whether the mediation was carried out before or after court proceedings were issued). (See *Lobster Group Ltd v Heidelberg Graphic Equipment Ltd* [2008] EWHC 413 (TCC)).

**6. In what respects can modern communications and information technology be harnessed to improve access to the civil courts?**

The use of websites for information (including listing, judgments and rules) and email for communication (including electronic filing) should be encouraged.

**7. To what extent should the court control the conduct and pace of litigation?**

The Chapter 43 procedure has been effective to the extent that it influences the conduct and pace of litigation, particularly in personal injury cases. The Court should be ready to intervene at the request of a party, for example, by striking out aspects of a defence without merit.

The experience in England & Wales is that attempts by courts to have too much control over the conduct and pace of litigation can add to the work and expense with little benefit and some harm to access to justice. For example the "allocation questionnaire" with a costs estimate at an early stage in proceedings is a time consuming process with very little benefit in most cases. (See also Appendix 3).

### **8. What types of case would benefit from (a) judicial case management and what types of case would benefit from (b) case-flow management?**

The Chapter 43 procedure works well and is not too onerous. The parties can in any event apply to the court for appropriate direction.

## **Chapter 6: WORKING METHODS OF THE CIVIL COURTS**

### **Questions for discussion**

#### **1. What are the advantages and disadvantages of pre-action protocols?**

Unite understands that the problems with the protocols are that the defenders and insurers do not comply and effective sanctions are not applied.

In England & Wales compulsory protocols have been in operation for a number of years. There too the same problems remain to such an extent that a "pre-pre-action" stage is being considered. Once again failures that can be laid at the door of the defenders and their insurers are being used by them to argue for changes that may have an adverse impact on access to justice.

The key is the application of effective sanctions.

Unite should perhaps add that the extent to which pre-action protocols in England & Wales have been said to be successful is based on their having been settled upon by the practitioners themselves in large degree. However, Unite considers that the pride in and acceptance of pre-action protocols may be misplaced.

#### **2. Should there be a greater use of pre-action protocols? If so, in what courts and for what types of action?**

See answer to question 1 above.

**3. Should compliance with pre-action protocols be voluntary or compulsory?**

See answer to question 1 above.

**4. Should there be a greater requirement for leave to bring or to take steps in proceedings? If so, at what points in proceedings and what criteria should the court apply in deciding whether leave should be granted?**

No. This would add to effort and expense, with no appreciable benefit in most cases.

**5. Are the current arrangements for making the rules of civil procedure satisfactory? Please give reasons for your views.**

Unite is not in a position to comment at this time.

**6. Should there be a single set of rules of civil procedure in both the Court of Session and the sheriff court?**

There is a sound logic in having the same rules in both courts.

**7. Should there be a single initiating document for (a) all types of action and/or (b) at all levels of the court structure? If so, what format should that document take?**

See answer to question 6. above.

**8. To what extent should a system of abbreviated pleadings be introduced?**

Abbreviated proceedings can be effective dependent upon the issues to be taken by the defender.

**9. Are the current arrangements for summary disposal satisfactory?**

Unite is not in a position to comment at this time.

**10. Should routine procedural matters in both the Court of Session and the sheriff court be dealt with by judges (perhaps at a more junior level) designated for that purpose?**

Routine procedural matters ought to be dealt with by rules. Designated Judges for procedural matters may assist with other matters considered routine perhaps improving consistency.

**11. Are the current arrangements for dealing with routine procedural business satisfactory?**

Generally the Chapter 43 procedure for PI cases is working well.

**12. Should the court have a greater degree of input in allocating the length of time to be set aside for a hearing? Should hearings be time limited or conducted by reference to a timetable determined by the court?**

Generally the Chapter 43 procedure for PI cases is working well in this regard. The use of court and judicial time is kept to a minimum.

**13. In the conduct of substantive hearings should there be greater use of written rather than oral arguments?**

Greater sanctions should apply to those defenders, who do not clearly identify matters in issue and detail their position. Written skeleton arguments can assist shortly for a hearing that is likely to proceed, but it cannot be a substitute for oral argument.

**14. To what extent should there be an earlier and/or wider disclosure of evidence?**

The Chapter 43 procedure for PI cases is working well in this regard.

**15. To what extent should the court have control over the use of expert and other evidence?**

The court should not control the use of expert and other evidence, save that the assessment of expenses should not require the losing party to pay for evidence not reasonably incurred for the disposal of the matters in issue on the face of the pleadings.

**16. Should a system of pursuers' offers be introduced into the civil courts procedure? If so, what features should such a system have?**

Yes. In this regard at least our experience indicates that the system in England & Wales has worked. However, it is undermined by inadequate penalties for defenders and their insurers. Unite would wish to see additional damages as a sanction in this regard, along with recovery of full costs reasonably incurred as a matter of course.

**17. Should civil jury trials be retained?**

Yes.

**18. Should written judgments be required in all cases?**

It is satisfactory that oral judgments are recorded and transcribed on request.

**19. Should the courts have greater powers to impose sanctions for non-compliance with court rules or where a party or his representative has behaved unreasonably? If so, what should these be?**

Yes. Deemed admissions, increased damages, and penalty costs to be paid by the representatives should all be included in the courts armoury to be used in appropriate circumstances in response to unreasonable behaviour.

For example, increased damages and deemed admissions may be appropriate if the pursuer successfully establishes at an early hearing that there were previous similar instances or relevant complaints that preceded an injury at work.

This is the sort of issue that would require further separate consultation in any event if it was to be taken forward.

**20. What measures should be available to the court to identify and manage unmeritorious causes or appeals brought by party litigants?**

Unite is not in a position to comment at this time.

**21. Is the current legislation on vexatious litigants in need of reform and, if so, how should that be done?**

Unite is not in a position to comment at this time.

**22. Should a person without a right of audience be entitled to address the court on behalf of a party litigant and, if so, in what circumstances?**

Subject to free representation by advocates being available, this should be allowed on application and provided the representative was not rewarded or paid in any way.

**23. Would it be desirable to introduce separate procedures for multi-party litigation?**

Yes. A suitable procedure for class actions (as is being encouraged throughout the EU and considered by the Civil Justice Council of England & Wales) would be of benefit. Indeed Unite considers that the courts in Scotland should not be left behind in this regard.

**24. Is the rule governing the procedure to be followed for judicial review satisfactory?**

Unite is not in a position to comment at this time.

**Conclusions**

Unite hopes that its contribution to the review is positive in terms of access to justice and the future of the civil court system.

The scope of the review is enormous. Unite hope it has made its position clear. If this paper does not it is sorry to the review team, its members and others who rely on a civil justice system that provides access to justice.

Unite is continuing to seek additional information requested. If there are any other matters arising from this response or otherwise, Unite is more than willing to help further.

Unite is keen to be involved in aspects of the review that are taken forward.

## **Appendix 1**

### **The complexities of personal injury and in particular employers' liability cases, including those of small and modest value.**

#### **1. The relationship with the potential defendant or defendants**

There is a very distinctive feature of employers' liability claims related to the nature of the relationship between the injured worker and the employer. This presents more opportunity for the employer to:

- Pressurise the injured person
- Unduly influence witnesses
- Tamper with evidence and documents
- Influence the insurer inappropriately.

This is a very real problem. The employer pays wages, has powers of discipline, allocates duties and under the contract is entitled to expect the employee to obey orders. This is the backdrop to an employers' liability claim.

The distinctive relationship has, for example, been recognised within the EU by the Committee on Employment and Social Affairs in relation to data protection. Medical information is sensitive data. Under data protection law, sensitive data may only be processed if specific consent is freely given. Due to the power imbalance between an employer and a worker, it is recognised that the worker is not free to give consent, if requested to do so.

By contrast in road traffic cases the scope for one party to unduly influence the other to the detriment of justice is far less. Nor do the same considerations apply in other types of case, including Public Liability.

#### **2. Allegations of breach of statutory duty**

Many of these are unique to employers' liability claims. In England a straightforward case for Steven May required a trial to establish the claimant's case that the equipment was not "suitable" in the context of Regulation 4(1) of the Provision and Use of Work Equipment Regulations 1998. This is relatively common and the County Court judges cannot be relied upon to understand the issues, which results in inconsistency of approach and often a denial of access to justice. There are invariably breaches of statutory duty to raise in employers' liability cases.

A Health and Safety Manager can be expected to respond to a request for an opinion following notification of a claim – and they often do – by failing

to the position that they were not at fault, when fault, in the sense of negligence, is not the only consideration.

### **3. The information imbalance**

In EL cases, the employers normally have power in relation to the information relating to an injury. Indeed they have obligations to investigate and prevent recurrence. This extends to earnings details to enable a calculation of losses to be made.

In a one month period in 2007 one of our lawyers in England reported that he issued four pre-action disclosure applications for earnings details in a liability admitted employers' liability cases, when the employers failed to respond to requests and reminders. The four cases are against different employers. (Details can be supplied).

Unite is bound to raise the point that the employers will benefit from the application of fixed costs in such circumstances and have less incentive to behave responsibly.

### **4. The need to promote health and safety**

Claims for damages are a form of prosecution or enforcement of health and safety laws. They draw attention to and encourage better compliance with such laws. Unite is committed to prevention and would rather our members did not have to take cases.

*Any further changes must not undermine health and safety, nor encourage bad employers to ignore the law, when they face no or a reduced sanction. Criminal prosecutors cannot and do not take action in response to any but a tiny proportion of breaches.*

### **5. Multi Defendant cases**

These too are relatively common in EL claims. They apply, for example, in many cases of injury sustained on a building site. It is common place for the dispute on liability to be confined to an argument between employers.

Corporate structures and the corporate veil can cause problems. It is not uncommon for the injured worker to have doubts as to who the employer is.

### **6. Who is the employer?**

Related to the previous point is that there can be confusion as to who has responsibility as employer. The courts have struggled with this concept over the years and this has become more of a problem over the last few years.

In December 2006, in another case the President of the UK Employment Appeal Tribunal said: *"We should not leave this case without repeating the observations made by many courts in the past that many agency workers are highly vulnerable and need to be protected from the abuse of economic power by the end users..." James v Greenwich Council EAT 18 Dec 2006 UKEAT/0006/06 paragraph 61.* Mrs. James also lost at the Court of Appeal.

This constitutes further recognition of the power of a company over a worker.

## **7. Time for investigation**

It often takes substantially longer in an EL for the insurer investigation. Some of the reasons for that are referred to in this appendix.

## **8. Causation**

If liability is admitted, other issues may still be in dispute which have a material effect on the likely outcome and the risks in relation the outcome. Causation is going to be the most likely issue to cause problems. It is accepted that in a relatively small number of RTAs the insurers might wish to argue the point in a low speed impact case, but the problem is far more significant in EL cases.

About a third of relatively straightforward EL cases involve an injury to the back. In many of those the question arises as to the nature of the circumstances, perhaps relating to the movement of a load. Admitting liability, but having causation in dispute in such a case, does not significantly reduce the amount of work required in relation to the events causing the accident and injury.

The problem is even greater in disease cases. In a liability admitted repetitive strain injury case, it has happened that days are spent in court with senior medical experts and non-medical experts giving evidence as to the work process, to consider the claimant's entitlement to damages. In one such case the conclusion was that the injury occurred as a result of an accident rather than a process, but liability was still established.

## **9. Disease cases**

It is apparent from the above that additional considerations in disease cases make it even more necessary to have high judicial standards and recovery of all reasonable expenses in successful cases.

Whilst limitation can arise in accident cases, more so in EL than PL, such arguments are much more likely to arise in a disease case.

### **9. The profit motive and exposure to risk**

The employer is often in business for profit and otherwise will seek to balance returns and/or productivity with health and safety. Employees at work are exposed to any risks for a substantial proportion of their day and indeed their lives. These issues tie in with others referred to above, but add to the imperative that EL claims are distinct from RTA and also to some extent Public Liability cases.

## **Appendix 2**

### **The problem for the unrepresented injured party – Unite evidence to FSA**

Examples of 7 cases demonstrating current practices  
Collated w/c 5 November 2007  
In alphabetical order

The cases have been selected to cover variety of insurers, problems and practices. The cases are from those identified by two law firms instructed by Unite the Union. There are other examples, and details could be supplied of the 10 other cases referred to in the August 2006 response to DCA consultation, for example, if required.

It will be appreciated that the information we receive on which this sample is of necessity reflects the smallest tip of a very large iceberg. Those who accept an offer or denial will rarely know that they have been ill advised and denied access to justice.

#### **1. Ms. B**

Insurer: **Zurich Municipal**, 351 Bristol Road, Birmingham B5 7SW  
Insurer Ref: 10/05/21/11184/Z

Status: **Settlement cheque to client 5<sup>th</sup> November 2007**

Public Liability (street accident).

Insurers initially dealt with Ms B directly.

Medical obtained.

Offered £4,000 in full and final settlement.

After that she contacted solicitors for advice.

Solicitors asked for the medical report.

A letter dated 9 days later from Zurich sending the medical report said "you will note that further x-rays are required for the expert to provide an opinion".

Hip replacement operation carried out and significant future care.

Settled for £35,000.

Attachments:

copy letter 28 July 2005 offering £4,000 in final settlement,

copy letter 19 August 2005 advising solicitors further evidence required,

copy letter 10 October 2007 offering £35,000 (2 pages)

(personal data removed from letters)

Comment: Ms. B was advised to reject £35k, as her solicitor considered this to be below the proper valuation of the case, but in spite of that

advice chose to accept. This occurred in circumstances where there was no conflict situation in relation to the offer under consideration.

## **2. Mr. D**

Insurer: **elephant.co.uk**, Capital Tower, Greyfriars Road, Cardiff, CF10 3AZ

Insurer reference: 703346215

Status: **Ongoing**

Road Traffic accident.

Significant spinal injury.

Insurers sent a letter with an offer of £7,500 within 2 weeks of accident, along with a form confirming Mr. D had been advised of his legal rights.

After solicitors were involved the latest offer now stands at £25,000 and solicitors have advised this is rejected.

Attachments:

copy letter 9 August 2007 offering £7,500 and attached form,

copy letter 11 September 2007 offering £25,000, if no medical evidence is obtained

(personal details removed from letters)

Comment: Solicitors instructed as luckily client is a work colleague of solicitor's husband. This is significant as it is rare that such cases are identified.

## **3. Ms. J**

Insurer: **Broker Direct plc**, Deakins Park, Hall Coppice Road, Egerton, Bolton, BL7 9RW

Insurer reference: ZU1/080215

Status: **Ongoing**

RTA. Pillion passenger, who suffered a fracture.

Orthopaedic report obtained by insurers direct.

Report recommended x-rays.

Member complained about delay. (It is in the insurers' interests to exploit this situation, whereas independent representatives would advise against this more strongly and in any event they are not conflicted).

Insurers offered £3,000 apparently on the basis of a full recovery.

Ms. J sought legal advice and was referred to solicitors via her union.

Solicitors consider £3,000 is low and are seeking further evidence.

Solicitors investigations generally revealed recoverable sick pay, which was not included in the insurers offer.

Attachments:

copy letter 10 September 2007 advising of need for x-rays

copy letter 19 September 2007 offering £3,000

copy letter from employer dated 18 October 2007 with form and conditions

Comment: Recoverable sick pay is an issue that will arise quite often. Many existing and former local and public authorities provide in contracts of employment that sick pay is paid as a loan that must be reclaimed in the event of a third party claim. Failure to claim this could leave the injured person with a claim by the employer under contract for the sick pay advance. In this case it is about £350, in many other cases it amounts to thousands of pounds.

**4. Mr. P**

Insurer: **Zurich UK Commercial**, 126 Hagley Road, Birmingham, B16 9PF

Insurer reference: LYE3296151

Status: **Ongoing**

Accident at work.

Insurer dealt with member direct initially.

On information supplied and obtained from the employer, the insurer chose to deny, when they should not have done, in the hope that the individual would give up his legitimate claim for breach of duty.

Insurer failed to raise breaches of statutory duty that applied.

Insurer advised on the right to seek legal advice, but not who to approach, let alone that the individual could seek assistance of his union at no cost win or lose.

Mr. P went to solicitors via his union.

Insurer made no attempt to follow pre-action protocol, but confirmed denial.

Primary liability now admitted.

Attachments:

Copy letter of 5 April 2007 denying liability

Copy letter 15 June 2007 regarding pre-action protocol

Copy letter 26 October 2007 admitting liability

Comment: This is another "Zurich" case in this list, but this involves the issue of unjustifiable denial and, among other things there was no advice on limitation, which solicitors would have given.

Further in relation to an accident at work the insurer hid the question of a breach of a statutory duty from the injured person. All insurers could be expected to behave this way in relation to injuries at work.

## **5. Mrs. R**

Insurer: **NFU Mutual**, Bristol Technical Claims, North Quay, Temple Black, Bristol, BS1 6FL  
Insurer reference: MP06C55968/MD

Status: **Settled – cheque to member 9 October 2007**

Insurer offered £1,750 direct to Mrs. R, but did recommend legal advice, which fortunately was obtained (via the union).  
Nevertheless, the insurers hoped she would accept their offer.  
Solicitors were sure the offer was low and indeed secured an offer of twice the amount for general damages.  
In addition £375 was paid for special damage, which the insurer did not make a proper to enquire about, in the same way that solicitors would.

Attachments:

Copy letter 4 December 2006 offering £1,750

Copy letter 26 July 2007 accepting £3,500 in respect of general damages

Comment: How much do insurers save by making such relatively low offers?

## **6. Ms. R**

Insurers: **Van Ameyde & Wallis Ltd**, Elliot House, Hillside Crescent, Edinburgh EH7 5EA (Insured - Go North East)  
Insurers reference: MF/GAG/05/51945

Status: **Settled 9 July 2007**

Road Traffic – car hit by bus.

Insurers sent cheque in full and final settlement within 2 weeks of accident for £750.

After that she contacted solicitors *as she was an old school friend of the person who pursued her case.*

Medical report then obtained.

Offer increased to just over £2,000.

Offer of £2,500 made later, which was accepted.

Attachments:

copy letter 13 June 2006 from insurers with cheque for £750 attached (personal data removed)

Comment: Another who had the good fortune to have a personal link to a specialist lawyer, to obtain a more appropriate sum in compensation. The injured person was advised to reject £2,500, but chose to accept. The case was believed to be worth four times the original offer.

## **7. Mr. W**

Insurers: **Quinn Direct Insurance**, Derrylin, Co. Fermanagh, BT92 9AU  
Insurers reference: 3459240/2005/274WLH

Status: **Current case**

Accident at work. Serious hand injury.  
Approached by Legal Consultancy Services (Quinn Direct Insurance), who arranged appointment with orthopaedic surgeon.  
Offers made under their "fast track policy" up to £24,000.  
Member sought advice via union for valuation.  
Union solicitors advised that the case be pursued properly.  
Insurers withdrew earlier offer put forward Part 36 offer on the basis that they made the earlier offer without anticipating that they may have to pay solicitors costs.

Counsel's advice confirms solicitor's confidence that more than £24,000 will be recovered. Investigations continuing for proper assessment under various heads of damage, including:

- a. general damages (pain suffering and loss of amenity)
- b. special damage (financial loss to date)
- c. care and services to date
- d. cost of future surgery (anticipated by medical evidence), time off and care
- e. "Smith" damages for prejudice on the open labour market
- f. interest on damages.

Attachment: copy letter dated 22 March 2007 advising that reduced offer is due to involvement of solicitors (personal data removed)

Comment: The insurers would never have investigated or advised fully in relation to all the appropriate heads of damage to ensure the correct total sum was reached.

## **Appendix 3**

### **The “Woolf reforms” in England & Wales**

Unite the union is in favour of an approach to litigation that involves “cards on the table” and early disclosure, including of written witness statements and experts reports.

The reform and the system generally in place in England & Wales is one that practitioners have become used to over the last 10 years and more. However, the changes introduced have not all been positive and most perhaps have served to increase cost and reduce access to justice. The judiciary looked at the problem from the perspective of taking cases away from the courts and to reduce the number of trials, but the effort required by the parties in the light of the controls by the courts cannot be justified in the context of the majority of cases taken by experienced litigators against insured defendants.

The opportunity for pursuers to make offers with an incentive to do so and some sanction on defenders works well in the main, but the sanctions need to be applied more effectively and be greater than they are.

The use of skeleton arguments before a trial is also widely appreciated.

However, written statements by witnesses to be used as evidence in chief undermines access to justice. The injured person is discouraged from putting his evidence orally and is launched straight in to cross examination often hostile and normally involving leading questions. It also means that cross examination is more immediately compelling than evidence in chief.

The process has the effect of requiring a detailed statement drafted by lawyers over a significant time period, at a stage in the proceedings when the case is likely to settle before trial. An alternative might be a shorter summary that the witness could expand on at trial, perhaps with costs consequences if there were genuinely new issues raised.

Judicial involvement in the process without the request of the parties is too high. The control of experts is too great. The experts can have too much encouragement reach a compromise, which does not reflect the application of a proper analysis in the context of litigation, such as concerning the question of exacerbation or acceleration of symptoms of a pre-existing medical condition.

Soon after issue in the County Courts there is a stage of exchange of “allocation questionnaires” and judicial involvement. This process includes an assessment of costs by both parties (when only one will win)

and otherwise does not serve to narrow the issues nor produce settlement in the majority of cases. Practitioners have described these as a “pointless bugbear”.

Similarly the detailed compulsory pre-action protocols result in “front loading” of costs. This problem has given rise to consideration by the Ministry of Justice at this time of a pre-pre-action system, believed by many to carry with it further adverse consequences for access to justice.

Insurers by their actions and inaction can rack up costs, which together with financial jurisdictional limits, can deny access to justice. All the work required in relation to the pre-action protocols is often wasted by insurers’ inadequate responses and the absolute lack of effective sanctions.

It is undoubtedly the case that the “Woolf” reforms have reduced the length of personal injury trials, which may satisfy the judiciary and the losing wrong doer, but this has been at a cost to access to justice.

Most case now proceed in the County Court and the standard of the judiciary remains a significant problem for practitioners, predictability and for our members and those we support. Access to justice suffers for the sake of expedience.

One personal injury expert speaks for many when he says: “There is also a problem that comes from fixed costs for advocates in County Court trials resulting in poorer representation on the claimant side. No proper research or argument of the law is the result with poor decisions for injured people.”

He adds: “The big thing to oppose is the Outer House becoming just an appellate court. The quality of the first instance decisions in Scotland is generally much higher than in England & Wales. This is because the judiciary in the OH are high quality whereas many judges in the County Court are not.” He was not aware of the change to the privative jurisdiction with effect from 14 January 2008. We fear it is too late for some, unless personal injury cases are treated as a special case. Unite urges the review team not to make the same mistakes as have been made in England & Wales.